In The

Supreme Court of the United States

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October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

REPLY ON BEHALF OF PETITIONER

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REA Express, Inc., a Bankrupt,

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Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

REPLY ON BEHALF OF PETITIONER

I.

This reply is submitted in response to the Brief in Opposition filed herein on behalf of the Civil Aeronautics Board. If the determination of whether to grant certiorari is to stand or fall on the accuracy of the Board's assertions (1) that it "did examine the cost of air express service in determining that the continuation of such service was no longer in the public interest" (fn. 11) and (2) that "the relevant economic factors were fully explored in the *Service* case" (fn. 12), then certiorari should be granted, for such assertions are flatly in error.

From the very beginning, REA has contended that the economic issues in the *Rates* case should not be bifurcated from the issues in the *Service* case. Having persisted in its wrongheaded approach over REA's continuing objection, the Board now seeks to evade responsibility for the error by misrepresenting to this Court the facts relative to its existence.

Instead of determining the economic issues, the Board consigned them to an administrative broom closet. Rather than fully exploring the relevant economic factors, the Board expressly declined to determine them, using the "no useful purpose" rubric as an excuse (52a). Indeed, the Board admitted the inadequacy of the record (56a-57a).

The Board said it need not determine the economic issues in view of its separate decision in the *Service* case (52a); we say the issues are inextricably intermingled and that the *Service* case may not be validly decided without a decision of the economic issues raised in the separate docket constituting the *Rates* case.

The procedural prejudice was extensive. Since a decision in the *Rates* case was never reached by the Board, its due process significance must be evaluated on the basis of REA's claims. On that basis, had the case been decided, (1) REA, with a claim of approximately $50 million against the airlines, might not now be in bankruptcy, (2) the rates paid by shippers could have been significantly reduced, (3) the number of Air Express shipments handled substantially increased, (4) 10,000 career express employees not thrown out of work, and (5) a different result reached in the *Air Express Service* case.

Thus the Board's own finding that the record was inadequate for the purpose of a decision on the economic issues would require, under *Universal Camera Corporation v. NLRB,* 340 U.S. 174, that the case below be remanded to the Board for findings if the undecided economic issues are essential for a proper determination. We submit that they are essential under prior rulings of this Court, and that certiorari should be granted to review the question.

II.

REA is in bankruptcy. Its trustee, C. Orvis Sowerwine, Esq., is presently operating a part of the surface business, and is entertaining proposals for full-scale restoration of the express services. The proposals received were filed with the Bankruptcy Court on May 24, 1976. The Bankruptcy Court has ordered them to be set down for hearings.

One such proposal contemplates the possibility of restoring Air Express operations. Some modifications in the arrangement may be required to implement new operational plans, in which

event they would be submitted to the Board for consideration. But this possibility should not be foreclosed by some *res judicata* problem which might be created by the decision below. In view of these changed circumstances, we suggest that the writ might appropriately be granted by summary action, the judgment below vacated, and the cause remanded. See Stern & Gressman, *Supreme Court Practice*, §5.13.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

s/ Arthur M. Wisehart

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